witness remembered the conversation. On the other hand the witness may answer "No", and the cross-examiner may not pursue the matter further, in which case no harm has been done. It is only when the cross-examiner desires to prove the impeaching statement by other witnesses that fairness requires the witness should be informed of the time, place and persons present when the alleged statement was made. In the principal case the rule was applied to expressions of hostility. These can hardly be said to be inconsistent statements but the same consideration of fairness to the witness requires that the circumstances should be related to him before the other witnesses are called in contradiction.

When the impeaching statement is in writing, however, the writing must be first shown to the witness. This rule simply ruins effective cross-examination and is based upon an erroneous decision of an English judge, later corrected by act of Parliament.[3] The code, however, incorporates the erroneous rule and puts the matter beyond the possibility of change by judicial decision.

A. M. K.

EXECUTORS AND ADMINISTRATORS: EFFECT OF JUDGMENT ESTABLISHING A REJECTED CLAIM.—The case of the *Estate of Hellier*[1] calls to notice an interesting anomaly in the California law governing the administration of the estates of decedents. It is well established both by legislative enactment and judicial decision that a judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate merely establishes the claim in the same manner as if it had been allowed by the executor or administrator and the court,[2] and that such judgment may be afterwards contested by any person interested in the estate in the same manner and to the same extent as any other allowed claim.[3] Section 1504 of the Code of Civil Procedure is construed to limit the general provisions of section 1582, which enact that actions for the recovery of real or personal property or to quiet title or to determine adverse claims thereto, and *all actions founded upon contracts,* may be maintained by and against executors or administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.[4] In other words, in all actions enumer-

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[3] Wigmore on Evidence, §§ 1259-1263.

[1] (Dec. 29, 1914), 49 Cal. Dec. 5, 145 Pac. 1008.

[2] Cal. Code Civ. Proc., § 1504; Beckett v. Selover (1857), 7 Cal. 215, 68 Am. Dec. 237; Hall v. Cayot (1903), 141 Cal. 13, 74 Pac. 299; Nathan v. Dierssen (1913), 164 Cal. 607, 612, 130 Pac. 12.

[3] Estate of More (1898), 121 Cal. 635, 54 Pac. 148.

[4] Estate of Hellier (Dec. 29, 1914), 49 Cal. Dec. 5, 145 Pac. 1008.

ated in section 1582, except upon money claims, a judgment against an executor or administrator concludes the heirs, legatees and devisees, but in the case of money claims, such a judgment does not attain the dignity and force of an absolute judgment until it has been adjudicated on the settlement of an account, or on the rendition of an exhibit, or in making a decree of sale.[5] It is only after the settlement of the account that an executor or administrator can safely discharge such a judgment,[6] and even then he is subject to the right of persons laboring under legal disability to re-open and examine the account.[7]

Although this is a reasonable literal interpretation of the law as it stands on the books,[8] the provision, as construed, seems inconsistent with the general theory of the law of administration. At the common law the executor or administrator represented the person of his testator or intestate,[9] and took all of his personal property.[10] This was the primary fund out of which the debts of the deceased were to be paid, and a judgment against the executor or administrator was binding upon all persons interested in the personalty.[11] In the case of realty, which descended directly to the heir,[12] a judgment against the executor or administrator was not necessarily binding upon the heir to the extent of subjecting the real estate, which had descended to him, to the satisfaction of the judgment.[13]

But in California both the real and personal estate of the ancestor vest in heir, legatee or devisee, subject to the lien of the executor or administrator for the payment of debts,[14] and realty and personalty are equally subject to the burden of the debts of the estate and the expenses of administration.[15] So, while the California law has abrogated the common law distinction between real and personal property in this respect, and has recognized the right of the executor or administrator in the real estate to the full logical extent,[16] allowing a judgment against them to bind the realty as well as personalty, it has made a peculiar exception in the case of money claims.

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[5] Cal. Code Civ. Proc., § 1636; Haub v. Leggett (1911), 160 Cal. 491, 117 Pac. 556.

[6] Cal. Code Civ. Proc., § 1647.

[7] Cal. Code Civ. Proc., § 1637.

[8] Hall v. Cayot (1903), 141 Cal. 13, 74 Pac. 299.

[9] Comyns' Dig., vol. 1, p. 259.

[10] Williams on Executors, 9th ed., vol. 1, p. 775.

[11] Woerner, American Law of Administration, 2nd ed., § 466.

[12] Williams on Real Property, 21st ed., p. 19.

[13] Woerner, American Law of Administration, 2nd ed., §§ 337, 446.

[14] Cal. Code Civ. Proc., § 1581.

[15] Cal. Code Civ. Proc., § 1516.

[16] Woerner, American Law of Administration, 2nd ed., § 337; Moody v. Peyton (1896), 135 Mo. 482, 36 S. W. 621; Proctor v. Proctor (1890), 105 N. C. 222, 10 S. E. 1036.

This rule may, in some instances, work great hardship upon the claimant. In the first place, if he loses his first suit, he is barred from further remedy, if he wins, he gets a judgment which is merely prima facie evidence of the validity of his claim.[17] Furthermore, it is a notorious fact that the administration of many estates is prolonged for a long period of years, so that the claimant's witnesses may die or disappear in the meantime. The inequality in the position of the claimant and of the heirs, legatees and devisees, whereby those interested in the estate have at least two chances to win as against the claimant's one, suggests that section 1636 of the Code of Civil Procedure, as interpreted in the principal case, may be obnoxious to the equal protection clause in the state and federal constitutions. That inequality is at least as great as that existing between the mechanics' lien claimant and the owner in respect to the allowance of attorneys' fees, which induced the Supreme Court to declare a statutory provision, for such allowances to the lien claimant, unconstitutional.[18]

Although the point has never been directly raised, it is doubtful whether the heirs or other persons interested would be proper parties defendant in the suit by the claimant. By our system of administration the heirs are only brought into the proceeding at a certain stage upon petition and notice, and previous acts of the executor or administrator and the judge must occur before they can contest.[19] It is clear that they are not necessary parties,[20] and it is questionable whether the courts would allow the regular order of administration to be disturbed in such a case. It would certainly be impracticable to join the creditors in such a suit.

A. A.

MINING LAW: EMINENT DOMAIN: PUBLIC USE.—Few questions have been submitted to the courts upon which there have been a greater variety and conflict of reasoning and results than those presented as to the meaning of the words "public use", as found in the different state constitutions regulating the right of eminent domain.[1] The case of *Inspiration Consolidated Copper Company v. New Keystone Copper Company*,[2] follows the narrower interpretation and holds that, in order to constitute a

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[17] Shiels v. Nathan (1910), 12 Cal. App. 604, 108 Pac. 34; Estate of More (1898), 121 Cal. 635, 638, 54 Pac. 148.

[18] Builders' Supply Depot v. O'Connor (1907), 150 Cal. 265, 88 Pac. 982.

[19] Beckett v. Selover (1857), 7 Cal. 215, 241, 68 Am. Dec. 237. See Miller and Lux v. Katz (1909), 10 Cal. App. 576, at p. 579, 102 Pac. 946.

[20] Robertson v. Burrell (1895), 110 Cal. 568, at p. 575, 42 Pac. 1086.

[1] For a discussion of "public use" see comment on State ex rel. Mountain Timber Co. v. Superior Court (1914), 77 Wash. 585, 137 Pac. 994, in 2 Cal Law Rev. 318. Also see comment on Anderson v. Smith-Powers Logging Co. (Ore., 1914), 139 Pac. 736, in 2 Cal. Law Rev. 407.

[2] (Ariz., Nov. 25, 1914), 144 Pac. 277.